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Supreme Court of the United States

OCTOBER TERM, 1949

No. 753

CARL B. GEORGE, PETITIONER,

versus

C. M. LEONARD AND LEONARD CONSTRUCTION COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR CLIFFORD M. LEONARD AND LEONARD CONSTRUCTION COMPANY IN OPPOSITION

JOHN K. DELOACH,
Camden, S. C.,

DAVID W. ROBINSON,
908 Palmetto Building,
Columbia, S. C.,
Attorneys for the Respondents.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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OPINIONS BELOW

The opinion and order of the United State District Court for the Eastern District of South Carolina denying the Respondent's motion for judgment *non obstante veredicto* is reported as *George v. Leonard,* 84 F. Supp. 205 (R. 190-201).

The opinion of the Court of Appeals for the Fourth Circuit reversing and remanding the cause with directions

to enter a judgment for the defendants is reported as Leonard v. George, 178 F. (2d) 312 (R. 300-306).

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on December 8, 1949. The appellee's petition for rehearing was denied on January 14, 1950. The petition for a writ of *certiorari* was filed on April 14, 1950. The jurisdiction of this Court is invoked under Title 28 U. S. C. A. 1254.

QUESTION PRESENTED

The question presented is whether a person who has been arrested on a criminal charge and released on bond can maintain an action for malicious prosecution where he has avoided a final adjudication of the criminal case by compromising the prosecutor's claim and having the charge dismissed.

STATEMENT

In February 1945, Carl George was employed by the Leonard Construction Company as assistant manager of its Sunny Hill Plantation in Kershaw County, South Carolina, and charged with the supervision of the raising of turkeys and keeping of accurate records in that particular (R. 17, 83, 142).

Though he had been employed for the calendar year, Carl George in mid-August 1945, prior to the marketing of the turkeys, demanded an immediate raise or his release. The Leonard Construction Company acquiesced in his release and Mr. George immediately applied for and obtained a job with the United States Government at its Shaw Field Air Base, some thirty miles from Sunny Hill (R. 21-22, 30-31, 155-6).

Investigating an apparent shortage in the flock of turkeys, R. B. Boykin, the defendant's manager, learned from plantation employees that Carl George had been secretly taking the turkeys at night. At the suggestion of State law enforcement officers, turkeys were purchased by one of them from Carl George on the Monday night before the termination of his employment. (R. 87-9, 106, 135-6, 143-4). When he failed to report the sale or to deposit the money to the plantation account, Mr. Boykin caused his arrest for breach of trust on Thursday. On the same day he was released on bond (R. 25-6, 56, 95, 126-7).

The following day Carl George and his father asked Mr. Boykin to settle the matter out of Court. After negotiating for half a day on the amount due the Leonard Construction Co., Mr. George paid the Company four hundred and fifteen dollars and procured the dismissal of the warrant (R. 50, 58, 67-9, 96-8, 127-31, 161-2).

In February 1946, some six months after the warrant had been dismissed, Carl George instituted in the United States District Court for the Eastern District of South Carolina, two actions against the Leonard Construction Company and Clifford M. Leonard, its President, each asking $175,000.00 damages. Both actions arose out of the facts relating to Mr. George's arrest. One, Civil Action 1444 (R. 3), was denominated "malicious abuse of process", the other, Civil Action 1445 (R. 203), "malicious prosecution". The cases were consolidated for trial.

At the first trial in March 1947, the defendants' motions to dismiss were granted after the plaintiff had completed his case. Thereafter the trial judge granted new trials in each case for the reasons presented in accompanying opinions. *George v. Leonard,* 71 F. Supp. 662; *George v. Leonard,* 71 F. Supp. 665.

After the District Judge's direction of a verdict for the defendants in the malicious abuse of process case had been reversed by the Court of Appeals, *George v. Leonard,* 169 F. (2d) 177, and after two mistrials in the "malicious prosecution" case (R. 190-1); the fourth trial resulted in a judgment for the plaintiff in the "malicious abuse of process" case on a jury verdict for actual damages (R. 186) and a judgment in the "malicious prosecution" case on a jury's verdict for punitive damages only (R. 187-189). The trial Judge refused the defendant's motion for judgment in the "malicious prosecution" case (*George v. Leonard,* 84 Supp. 205) (R. 190-201). The judgment in the "malicious abuse of process" case was paid by the defendants and the judgment in the "malicious prosecution case was reversed by the Court of Appeals for the Fourth Circuit in *Leonard v. George,* 178 F. (2d) 312. The petition seeks review of this reversal.

The District Court properly charged the jury that there could be no recovery in the malicious prosecution action if the criminal proceeding was dismissed as a result of a settlement between the accused and the prosecutor (R. 166, 173). However, he submitted the case to the jury on the theory that there was evidence that the warrant was dismissed for failure of proof or because improvidently brought (R. 166, 183, 194).

The Court of Appeals held that there was no evidence that the warrant was dismissed "because it was improvidently brought or because of no sufficient proof to support it", and that the judgment could not be sustained on the theory that the accused had been coerced into settling or on the theory that the settlement was against public policy (R. 301-304). It therefore reversed with directions that the District Court enter judgment for the defendants. *Leonard v. George,* 178 F. (2d) 312.

ARGUMENT

I

certiorari does not Lie to Review Evidence

The decision of the Fourth Circuit decides no issue of South Carolina law. In accord with the general rule, South Carolina allows no recovery in malicious prosecution where the accused has entered into a compromise settlement with the prosecutor. The Court of Appeals has merely evaluated the evidence and reached the conclusion that it shows such a compromise.

That issue is not reviewable here. Supreme Court Rule 38 (5); *Houston Oil Co. v. Goodrich,* 245 U. S. 440; *Southern Power Company v. N. C. Public Service Co.,* 263 U. S. 508; *General Talking Pictures Co. v. Western Electric Co.,* 304 U. S. 175; *National Labor Relations Board v. Waterman,* 309 U. S. 206.

II

The Case was correctly decided by the Court of Appeals under applicable South Carolina Law

In order to maintain an action for malicious prosecution in South Carolina it is incumbent upon the plaintiff to show *inter alia* that the criminal prosecution terminated favorably to him. *Stoddard v. Roland,* 31 S. C. 342, 9 S. E. 1027; *China v. S. A. L.,* 107 S. C. 179, 92 S. E. 335; *Baker v. Hornik,* 57 S. C. 213, 35 S. E. 524; Restatement of the Law of Torts, Vol. 2, § 660.

It is also the law of South Carolina that where the criminal proceeding has been terminated pursuant to an agreement of compromise, or has been withdrawn at the request of the accused, there is not such a termination as will support an action for malicious prosecution. *Jennings v. Clearwater Mfg. Co.,* 171 S. C. 498, 506, 172 S. E. 870,

873; Restatement of the Law of Torts, Vol. 2, § 660, pages 398, 400; *George v. Leonard,* 71 F. Supp. 665, 666; *Leonard v. George,* 178 F. (2d) 312, 313; *White v International Text Book Co.,* 156 Iowa 210, 136 N. W. 121, 42 L. N. S. 346.

Since the evidence shows that the criminal proceeding was terminated by a compromise settlement, instigated by the accused and voluntarily and knowingly consummated by him, there was no issue for the jury. *Leonard v. George,* 178 F. (2d) 312, 314; *Ewe v. Angland,* (Ill.) 60 N. E. (2d) 774; Annotation 67 A. L. R. 513 (R. 166).

CONCLUSION

The petition presents no grounds for *certiorari.*

Respectfully submitted,

JOHN K. DELOACH,
Camden, S. C.,

DAVID W. ROBINSON,
908 Palmetto Building,
Columbia, S. C.,

Attorneys for the Respondents.

May, 1950.